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IN THE

Supreme Court of the United States

WESTAFF (USA) INC. (as Administrator of the WESTERN STAFF SERVICES EMPLOYEE HEALTH PLAN) dba WESTERN STAFF SERVICES,

Petitioner,

vs.

BETTY ARCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 502(a)(3) of ERISA authorizes ERISA plans to bring an action in federal court "(A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any . . . terms of the plan." 29 U.S.C. § 1132(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002), the Court held that an action to enforce the terms of an ERISA plan is not equitable within the meaning of Section 502(a)(3) if the relief sought would impose personal liability on the defendant. The question presented by this case is whether *Great-West* means, as the Ninth Circuit says it does, that an action to enforce the terms of an ERISA plan is not equitable even if the action does not seek to impose personal liability on the plan member, but is limited to the recovery of particular funds held in an escrow account pending resolution of the dispute between the plan and the member over their respective rights to those funds.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

RULE 29.6 STATEMENT

Petitioner Westaff (USA), Inc. appears here as administrator of the Western Staff Services Employee Health Plan. Westaff, Inc., a Delaware corporation, owns 100% of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Westaff (USA), Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The Ninth Circuit's decision in this case is based on a mistaken interpretation of *Great-West Life and Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708 (2002), and is in direct conflict with a Seventh Circuit decision that presaged this Court's reasoning in *Great-West, Health Cost Controls of Illinois v. Washington*, 187 F.3d 703 (7th Cir. 1999) (Posner, C.J.), *cert. denied*, 528 U.S. 1036 (2000).

Section 502(a)(3) of ERISA authorizes ERISA plans to bring an action in federal court "(A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3).[1] The Ninth Circuit has interpreted *Great-West* to mean that the phrase "other appropriate equitable relief" in Section 502(a)(3) excludes an ERISA plan's action seeking relief that is limited to the recovery of particular funds from a settlement of a plan member's personal injury claim being held in escrow pending the outcome of litigation between the plan and the member to determine which party is contractually entitled to the funds. (Pet. App. at A2-A3.) That is a misinterpretation of *Great-West*.

Under *Great-West*, whether an action by an ERISA plan against a member to enforce plan terms is equitable (as

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[1] Section 502(a)(3) speaks in terms of actions brought by a "fiduciary" of an ERISA plan, as opposed to actions by plans themselves. In this Petition, however, we refer to actions brought by "plans" under Section 502(a)(3).

opposed to legal) turns on where the money to satisfy a judgment would come from. If the judgment would be payable out "some funds" of the member, the action is not equitable because it would impose personal liability on the member. On the other hand, if the judgment would be payable out of "particular funds," the action is equitable. 534 U.S. at 214.

Here, Petitioner does not seek to hold the member personally liable for anything. Although it paid over $30,000 of the member's medical expenses, Petitioner has confined the relief it seeks to $15,000 -- a specifically identifiable sum of money that was obtained in settlement of the member's personal injury claim and is being held in escrow.

All that counts for the Ninth Circuit, however, is that Petitioner seeks to recover money. According to the Ninth Circuit, *Great-West* means that any action to recover money under Section 502(a)(3) is necessarily an action at law. *Great-West* does not sweep so broadly. The Court there held only that an action is not equitable under Section 502(a)(3) if it seeks to impose personal liability. The Ninth Circuit's expansion of *Great-West* to render every action by an ERISA plan against a member for the recovery of money an action at law does violence to this Court's reasoning in *Great-West*. It would eviscerate the line between legal and equitable that this Court meticulously drew in *Great-West* and effectively foreclose ERISA plans from ever enforcing their contractual right to reimbursement.

The Ninth Circuit's holding also conflicts squarely with the Seventh Circuit's decision in *Health Cost Controls*. Charting the same distinction between legal and equitable relief that this Court made later in *Great-West*, the Seventh Circuit, in an opinion by Chief Judge Posner, held that an action by an ERISA plan was equitable when, as in this case, the relief was limited to the recovery of particular funds from the settlement of a plan member's personal injury claim being held in an escrow account. 187 F.3d at 710-11.

In addition to the conflict that the Ninth Circuit has created with the Seventh Circuit, the Ninth Circuit has read *Great-West* in a way that differs radically from the Fifth Circuit's reading. In *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002), the Fifth Circuit interpreted *Great-West* to mean that the test for determining whether an action by an ERISA plan to enforce its contractual right to reimbursement is equitable turns on whether the money from which a judgment would be paid is within the "possession and control" of the member. Applying that interpretation of *Great-West*, the Fifth Circuit held that an action to recover particular funds from the settlement of a plan member's personal injury claim that had been placed in a court registry to satisfy liens was not equitable because the funds were not within the "possession and control" of the member. *Id.* at 450. The Fifth Circuit's interpretation of *Great-West* is as confused as the Ninth Circuit's. Not only are the Ninth and Fifth Circuits' interpretations of *Great-West* at odds with each other, but both interpretations conflict with the Seventh Circuit's interpretation of the "other equitable relief" language in Section 502(a)(3).

If allowed to stand, the Ninth Circuit's decision in this case will have profoundly adverse financial consequences for the nation's health insurance system. If a plan can never sue in federal court under Section 502(a)(3) to recover money for a member's breach of the plan's subrogation and reimbursement terms, it is left with no effective means of redress, given that federal courts have exclusive jurisdiction over such actions, 29 U.S.C. § 1132(e)(1), and that any such claims based on state law appear to be preempted by ERISA. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987). Without this critical means by which an ERISA plan can recoup medical expenses, premiums for all members will inevitably increase.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. at A1-A4) is reported at 298 F.3d 1164 (2002). The district court's opinion (Pet. App. at A5-A13) is unpublished.

PERTINENT STATUTORY PROVISIONS

Section 502(a)(3) of ERISA authorizes an ERISA plan "participant, beneficiary or fiduciary" to bring an action in federal court "to (A) enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief to (i) redress such violations or (ii) to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). Section 502(e)(1) of ERISA provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions brought under" Section 502(a)(3). 29 U.S.C. § 1132(e)(1).

JURISDICTION

The Ninth Circuit issued its opinion on August 15, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The ERISA Plan.

Westaff (USA), Inc. ("Petitioner") administers the Western Staff Services Employee Health Plan (the "Plan"), an ERISA welfare benefit plan under 29 U.S.C. § 1002(1). (Pet. App. at A2). Petitioner is a "fiduciary" of the Plan under 29 U.S.C. § 1002(1), and thus may enforce the terms of the Plan under Section 502(a)(3) of ERISA.

The Plan has subrogation and reimbursement rights with regard to any money recovered by a Plan member[2] in settlement of a claim against a third party, to the extent that the recovered funds reimbursed the member for medical

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[2] This Petition uses the term "member" to refer to persons covered by ERISA plans.

expenses paid by the Plan. (*Id.* at A14-A15.) The Plan also "has a lien on any amount recovered by the [member] whether or not designated as payment for medical expenses." (*Id.* at A-14) The member is expressly required to "repay the Plan the benefits paid on his or her behalf out of the recovery made from the third party or insurer." (*Id.* at A-14.)

B. The Settlement Proceeds.

Respondent Betty Arce is a member of the Plan. In 1997, she was injured in an automobile accident. The Plan paid medical expenses on Arce's behalf in excess of $30,000. (*Id.* at *A-6.)* Respondent signed a "Reimbursement Agreement" reaffirming that she would reimburse the Plan for those expenses from any money she recovered from a third party. (*Id.* at *A16-A18.)*

When Respondent settled a personal injury claim, the third party's insurer issued a check for $15,000 made payable jointly to Respondent and Petitioner. Both parties endorsed the check, agreeing to put the money into an escrow account pending a determination of who was contractually entitled to it. (*Id.* at A2.)

Petitioner then sued Respondent in federal court under Section 502(a)(3) of ERISA for breach of the Plan terms in refusing to recognize Petitioner's right to the $15,000 as reimbursement for medical expenses paid by the Plan. In particular, Petitioner sought a declaratory judgment that it was contractually entitled to the money in the escrow account. (*Id.* at A2.)[3]

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[3] Petitioner also sought specific performance of Respondent's obligation to reimburse the Plan, but the remedy of specific performance adds nothing of consequence to the remedy of declaratory judgment that Petitioner is seeking. If the Plan obtains declaratory relief, it will "take the [judgment] to the escrow agent and get the money from him." *Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 711 (7th Cir.), *cert. denied*, 528 U.S. 1036 (2000).

C. The Opinions Below.

The District Court dismissed Petitioner's action, holding that it was not equitable and thus not authorized under Section 502(a)(3) of ERISA. The Ninth Circuit affirmed. Relying on *Great-West* as controlling authority,[4] the Ninth Circuit held that Petitioner's action was legal, not equitable, even though the court implicitly acknowledged that the facts of the case were different from those in *Great-West* "in that the money at issue [in this case] . . . has been placed in an escrow account and remains specifically identifiable." (Pet. App. at A3). The Ninth Circuit deemed this difference to be irrelevant to the Section 502(a)(3) inquiry, believing that Petitioner's action to enforce the terms of the Plan "remains one for money damages," despite the fact that Petitioner limited the relief it sought to the $15,000 sitting in the escrow account. (*Id.*)

Neither the District Court nor the Ninth Circuit addressed the merits of the dispute as to which party is contractually entitled to the $15,000. Those funds remain in the escrow account.[5]

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT HAS MISREAD *GREAT WEST* AS MEANING THAT THE RECOVERY OF MONEY IN AN ACTION TO ENFORCE THE TERMS OF AN ERISA PLAN CAN NEVER BE EQUITABLE WITHIN THE SCOPE OF SECTION

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[4] *Great-West* was decided after briefing at the Ninth Circuit was complete. Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Petitioner submitted a letter to the Ninth Circuit citing *Great-West* as "supplemental authority" in support of its argument that its claim was equitable under Section 502(a)(3) of ERISA. (Pet. App. A19-A20) The Ninth Circuit did not request supplemental briefing on the impact of *Great-West.*

[5] The Ninth Circuit has stayed its mandate pending the filing of this petition for certiorari. (Pet. App. at A21.)

502(A)(3) OF ERISA, EVEN IF THE PLAN DOES NOT SEEK TO HOLD THE MEMBER PERSONALLY LIABLE, BUT SEEKS ONLY TO RECOVER SPECIFICALLY IDENTIFIABLE MONEY HELD IN AN ESCROW ACCOUNT.

The Ninth Circuit treated *Great-West* as controlling authority in this case, notwithstanding its implicit acknowledgment of a significant difference in the facts of the two cases. As stated by the Ninth Circuit, the difference is that "the money at issue [in this case] has been placed in an escrow account and remains specifically identifiable." (Pet. App. at A3.) That, of course, was not the case in *Great-West*. There, the settlement proceeds had been disbursed to various accounts for the benefit of the plan member, including a trust account. 534 U.S. at 207-08. Thus, in suing the member for reimbursement of medical expenses, the plan in *Great-West* sought a judgment payable out of her general assets -- a judgment that this Court said would have imposed personal liability on the member. *Id.* at 210, 214.

In *Great-West*, the plan did not confine its relief to the recovery of particular funds, as Petitioner has done in this case. Here, relief has been limited to the recovery of the specifically identifiable $15,000 held in the escrow account. With a paucity of analysis, but purportedly relying on *Great-West*, the Ninth Circuit deemed this factual difference to be irrelevant, holding that the action was legal, not equitable, within the meaning of Section 502(a)(3) of ERISA because the relief "remains one for money damages." (Pet. App. at A3)

The Ninth Circuit was simply wrong to dismiss as inconsequential this distinction between reimbursement from specifically identifiable funds and reimbursement from a member's personal assets generally. In fact, the distinction was expressly made by this Court in *Great-West* in a critical passage that contrasted relief sought from "some funds" and relief sought from "particular funds." This distinction between "particular funds" and "some funds" was pivotal to the

Court's distinction between equitable and legal relief under Section 502(a)(3) of ERISA. The passage states:

> The basis of petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable -- the imposition of a constructive trust or equitable lien on particular property -- but legal -- the imposition of personal liability for the benefits that they conferred upon respondent.

534 U.S. at 214 (emphasis in original). As this passage makes clear, the Court in *Great-West* viewed relief limited to "particular funds" as equitable restitution that can take the form of either a constructive trust or an equitable lien on those funds -- as distinguished from relief paid out of "some funds," which imposes personal liability on the member.

An incomplete version of this quotation from *Great-West* pretty much constitutes the sum and substance of the Ninth Circuit's analysis of that case. What the Ninth Circuit omitted and replaced with ellipsis was critical language in the first sentence of the passage that sets up the distinction between "particular funds" and "some funds." With the omitted portion in bold, the Ninth Circuit quoted the passage as follows:

> The basis of petitioners' claim is **not that respondents hold particular funds that, in good conscience, belong to petitioners, but** that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable -- the imposition of a constructive trust or equitable lien on particular property -- but legal -- the imposition of personal liability for the benefits that they conferred upon respondent.

(Pet. App. at A3 (quoting *Great-West*, 534 U.S. at 214).) In relying on this partial quotation from *Great-West*, the Ninth Circuit apparently overlooked the significance that this Court in *Great-West* attached to the distinction between "particular funds" and "some funds."

Observing the distinction between "particular funds" and "some funds," Petitioner has limited its relief to a recovery of particular funds -- the $15,000 in settlement proceeds that has been placed in the escrow account. Petitioner thus does not seek to impose personal liability on Respondent because it does not seek to recover some funds from her personal assets generally.

To the Ninth Circuit, however, all that counts is that Petitioner seeks to recover money, with the source and location of the funds having no bearing on the Section 502(a)(3) inquiry. The upshot of the Ninth Circuit's approach is a blanket rule, ostensibly predicated on *Great-West*, that every action by an ERISA plan seeking to enforce contractual rights to reimbursement of medical expenses is necessarily an action at law for purposes of Section 502(a)(3). The Ninth Circuit's rule finds no support in *Great-West*. To the contrary, that rule eviscerates the line between law and equity in Section 502(a)(3) of ERISA that was drawn so meticulously by this Court in *Great-West*.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS SQUARELY WITH THE SEVENTH CIRCUIT'S DECISION IN *HEALTH COST CONTROLS V. WASHINGTON*, 187 F.3d 703 (7th CIR. 1999).

In holding that relief limited to the recovery by Petitioner of the particular funds being held in escrow is not equitable within the meaning of Section 502(a)(3) of ERISA, the Ninth Circuit has created a direct conflict with the Seventh Circuit's decision in *Health Cost Controls of Illinois v. Washington*, 187 F.3d 703 (7th Cir. 1999) (Posner, C.J.), *cert. denied*, 528 U.S. 1136 (2000). The facts of the two cases are indistinguishable: In *Health Cost Controls*, as in this case,

the plan member was contractually obligated to use settlement proceeds to reimburse the ERISA plan for medical expenses; a settlement check from an insurance company was made payable jointly to the plan and to the member; the plan and the member agreed to deposit the money into an escrow account pending a determination of which party was contractually entitled to it; and the relief sought by the plan was limited to the particular money held in escrow. 187 F.3d at 706.

Unlike the Ninth Circuit, the Seventh Circuit considered it highly significant -- indeed, dispositive -- to the Section 502(a)(3) inquiry that the plan confined the relief it sought to specifically identifiable funds held in an escrow account.[6] As Chief Judge Posner recognized in his opinion, the relief sought by the plan in *Health Cost Controls* was equitable because it was "not seeking damages, or indeed any form of payment, from [the member]." *Id.* at 710.[7]

Chief Judge Posner's reasoning presaged the distinction made in *Great-West* between relief from "some funds" and relief from "particular funds." Whether it is characterized as a constructive trust or an equitable lien, Chief Judge Posner said, relief limited to the recovery of particular funds held in

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[6] As Chief Judge Posner astutely observed, the role of the escrow agent in *Health Cost Controls* was limited to paying whichever party the court determines is contractually entitled to the funds. *See Health Cost Controls*, 187 F.3d at 711 (winning party "can take the [judgment] to the escrow agent and get the money from him"). The same holds true of the role of the escrow agent in this case. Chief Judge Posner's cogent analysis makes plain that no purpose would have been served by naming the escrow agent as a defendant. Whichever party ultimately prevails on the merits of the contract dispute between Petitioner and Respondent will assuredly be paid by the escrow agent.

[7] Although Petitioner relied on the Seventh Circuit's decision in *Health Cost Controls*, (Pet App. at A22-A26), the Ninth Circuit did not cite the case in its opinion.

an escrow account is equitable relief within the meaning of Section 502(a)(3) of ERISA.[8]

That theme is echoed in Judge Weiner's dissent in the Fifth Circuit's *Bauhaus* case. As Judge Weiner explained, whatever the precise label attached to it, an action in which an ERISA plan limits the relief it seeks to a judicial declaration of its contractual right to particular funds in a segregated account is an action in equity for purposes of Section 502(a)(3). 292 F.3d at 452-53.[9]

III. THE NINTH AND FIFTH CIRCUITS HAVE DERIVED FROM *GREAT-WEST* RADICALLY DIFFERENT TESTS FOR DETERMINING IF AN ACTION TO ENFORCE THE TERMS OF AN ERISA PLAN IS AN ACTION IN EQUITY FOR PURPOSES OF SECTION 502(a)(3) OF ERISA.

In contrast to the Ninth Circuit -- which has read *Great-West* to mean that every action by an ERISA plan seeking the recovery of money is necessarily legal for purposes of Section

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[8] In seeking a declaratory judgment that it was contractually entitled to the $15,000 being held in escrow as reimbursement for medical expenses, Petitioner relied upon the terms of the Plan giving it an equitable lien on funds recovered by a member in settlement of a claim against a third party. (Pet. App. at A14.)

[9] The analysis of Chief Judge Posner and Judge Weiner finds support by analogy to the historically equitable actions of interpleader and quiet title. An action by an ERISA plan seeking a declaratory judgment that it is contractually entitled to specifically identifiable money in an escrow account is the functional equivalent of an equitable interpleader action brought by the escrow agent in which the plan and the member would litigate the question of who is contractually entitled to the money. Interpleader was historically available only in courts of equity. *See* 7 Wright, Miller & Kane, Federal Practice & Procedure, § 1702 (3d ed. 1986). An action by an ERISA plan seeking a declaratory judgment that it is contractually entitled to specifically identifiable money in an escrow account is also the functional equivalent of a quiet title action, which is, of course, an equitable action. *See Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684, 690-91 (1927).

502(a)(3) of ERISA, regardless of the source and location of the funds -- the Fifth Circuit has read *Great-West* to mean that an action is not equitable if it seeks the recovery of money that is not within the "possession or control" of the member. *Bauhaus* 292 F.3d at 445.[10]

In *Bauhaus*, over $78,000 of the proceeds of a plan member's settlement of a personal injury claim was deposited in a segregated account, namely, a court registry, to cover any potential liens on the settlement. *Id.* at 440. In an action against the member to enforce its right to reimbursement, the plan limited its relief to a declaration that it was contractually entitled to recover $46,229.45 from the funds in the registry -- an amount that represented the medical expenses paid by the plan on the member's behalf. *Id.* Based on its reading of *Great-West*, the Fifth Circuit held that the plan's action was not equitable because it did not seek the recovery of money within "the possession or control" of the member. *Id.* at 445.

As Judge Weiner forcefully argued in his dissent, however, the Fifth Circuit majority failed to apprehend that, in *Great-West*, the critical factor in this Court's distinction between legal and equitable relief under Section 502(a)(3) in *Great-West* is not whether the member was in possession and control of the funds, but rather whether the relief sought would have imposed personal liability on her. *Id.* at 449-50 (Weiner, J., dissenting). In Judge Weiner's view, this distinction "turned on where the money to pay the judgment would come from." *Id.* If the plan seeks to recover money from the member's "personal, fungible, and untraceable resources, the remedy sought is legal" because it is "in personam relief" against the member. *Id.* at 450-51. But if the plan seeks to recover money from "specifically identifiable" funds in a segregated account, the remedy sought is equitable because it is "*in rem* [relief] against funds

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[10] The Ninth Circuit did not cite *Bauhaus*, which, at the time of the Ninth Circuit's decision, was the only published post-*Great-West* Court of Appeals opinion on the books.

possessed by a neutral stakeholder." *Id.* at 451. As Judge Weiner explained, because the plan in *Bauhaus* limited its relief to the recovery of specifically identifiable funds in the court registry, there was "no conceivable danger . . . of the district court's imposing general, personal, contractual liability on anyone." *Id.* at 451. Judge Weiner's analysis that an action is equitable if the relief is limited to the recovery of specifically identifiable funds in a segregated account is thus totally consistent with Chief Judge Posner's analysis in *Health Cost Controls*.

All told, the Fifth Circuit's reading of *Great-West* is as confused as the Ninth Circuit's. And although the Fifth Circuit and the Ninth Circuit both held that the particular plans' actions at issue were not equitable under Section 502(a)(3), they reached that result by applying markedly different tests. In other cases, application of these disparate tests inevitably will lead to divergent results in the district courts in the Fifth and Ninth Circuits.[11]

IV. THE NINTH CIRCUIT'S DECISION, IF ALLOWED TO STAND, WILL HAVE PROFOUNDLY ADVERSE FINANCIAL CONSEQUENCES FOR THE NATION'S HEALTH INSURANCE SYSTEM.

If an ERISA plan is precluded from suing in federal court under Section 502(a)(3) to enforce the terms of its plan,

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[11] This is confirmed by the treatment of *Bauhaus* by a district court in the Fifth Circuit in *IBEW-NECA Southwestern Health & Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812 (N.D. Tex. 2002). There, an ERISA plan sought reimbursement from specific funds held in an escrow account controlled by an attorney for the plan member. The district court held that the plan's action satisfied the Fifth Circuit's "possession" test because the escrow account was "clearly traceable" to the plan member. *Id.* at 816. Accordingly, the court held that the plan's action was equitable under Section 502(a)(3). *Id.* But if the plan's action had been litigated in the Ninth Circuit instead of the Fifth Circuit, the district court would have reached the opposite conclusion because the action sought the recovery of money -- which, to the Ninth Circuit, is the *sine qua non* of a legal action.

it cannot simply turn around and seek redress in state court or under state law. Federal courts have exclusive jurisdiction over Section 502(a)(3) actions, 29 U.S.C. § 1132(e)(1), and ERISA appears to preempt all state law claims. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987). Thus, the Ninth Circuit's blanket rule that every action seeking the recovery of money under Section 502(a)(3) is necessarily legal leaves ERISA plans with no effective recourse against a member who has breached a plan's reimbursement terms.

The Ninth Circuit's rule will have profoundly adverse financial consequences for the nation's health insurance system. There can be no question about the importance of an ERISA plan's ability to enforce its subrogation and reimbursement rights.[12] For example, Trover Solutions, one of the country's largest providers of outsourced subrogation/reimbursement services for health plans, reported that it had recovered $238.5 million on behalf of its health plan clients in 2001, and it had an additional backlog of over $1.4 billion of potentially recoverable claims. Trover Solutions, Inc., Form 10-K, for the fiscal year ended Dec. 31, 2001, at 26. The Ninth Circuit's rule essentially bars ERISA plans from enforcing those rights. The financial impact of the Ninth Circuit's rule will be staggering. The Maryland General Assembly recently estimated that health insurance premiums for state workers would rise between 1% and 2% if insurers' subrogation and reimbursement were eliminated. *See* Fiscal Note, at http://mlis.state.md.us/2000rs/billfile/SB0903.htm. And for every 1% increase in insurance premiums,

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[12] Private insurers have relied on subrogation remedies to recoup their costs at least since the middle of the 18th century. *See* M. L. Mabasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine*, 10 Val. U. L. Rev. 45, 63 (1975). The origins of modern subrogation remedies derive from the English courts of equity. *See generally Id.*

approximately 300,000 Americans are priced out of health insurance.[13]

The financial toll on the nation's health insurance system exacted by the Ninth Circuit's rule will also frustrate the congressional goal of uniform enforcement of employee benefit plans under ERISA. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). For Congress, uniformity is imperative because it promotes greater efficiency in the administration of ERISA plans. *Id.* at 11. There is no uniformity in the enforcement of ERISA in the federal courts today. The Ninth Circuit is in direct conflict with the Seventh Circuit over the interpretation of Section 502(a)(3) of ERISA, and the Ninth and Fifth Circuits disagree over the way this Court has interpreted that statutory provision in *Great-West*. These three large circuits encompass nearly 40% of the nation's population.

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[13] *See* Health Economics Practice of Barents Group, LLC, "Impact of Legislation Affecting Managed Care Consumers: 1999-2003" (April 21, 1998) (prepared for the American Assoc. of Health Plans).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Ninth Circuit.

WESTAFF (USA) INC., a California corporation (as Administrator of the Western Staff Services Employee Health Plan) dba Western Staff Services,
Plaintiff-Appellant,

v.

Betty ARCE, a single woman,
Defendant-Appellee.

Nos. 00-16178, 01-15751.

Argued and Submitted July 9, 2002.
Filed Aug. 15, 2002.

Mark S. Sifferman, Norling, Kolsrud, Sifferman & Davis, P.L.C., Phoenix, AZ, for the plaintiff-appellant.

Andrew C. Hubert, Gilbert, Kelly, Crowley & Jennett, LLP, Riverside, CA, for the defendant-appellee.

Appeal from the United States District Court for the District of Arizona; Morton Sitver, Magistrate, Presiding.

Before SCHROEDER, Chief Judge, FISHER and PAEZ, Circuit Judges.

OPINION

SCHROEDER, Chief Judge.

Westaff (USA), Inc. appeals the dismissal of its action for reimbursement of medical benefits paid to Betty Arce, and the award of attorney's fees to Arce, a beneficiary of Westaff's ERISA employee benefit plan. The issue is whether Westaff could bring this action seeking a money judgment in federal court, despite the provision in ERISA permitting suits only for equitable relief. *See* 29 U.S.C. § 1132(a)(3). Westaff contends that its action is allowed because the money sought

is being held in escrow. We hold the existence of the escrow does not affect the application of the statute and affirm both the district court's dismissal and the award of fees.

Westaff is the administrator of the Western Staff Services Employee Health Plan, an employee welfare benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(1). Betty Arce was an employee of Westaff and a "covered person" under the Plan. The terms of the Plan provided that the Plan had subrogation and reimbursement rights in any monies received by a covered person from a third party tortfeasor, to the extent that the recovered funds reimbursed the covered person for medical expenses that had been paid by the Plan. After Arce was injured in an automobile accident, she reaffirmed in a written agreement her obligation to repay Westaff for any medical expenses that she was able to recover from a third party.

Arce received $15,000 to settle her claim against the third party responsible for her injuries. The third party's insurance company issued the check to both Arce and Westaff, as co-payees. Arce forwarded the check to Westaff, asking for its endorsement so that the check could be cashed, and agreed to put the proceeds of the check into an escrow account pending a determination of to whom the money was owed. Westaff then filed this lawsuit against Arce, seeking a declaratory judgment that the funds in escrow belonged to it and seeking specific performance of Arce's obligation to reimburse Westaff.

ERISA authorizes plan administrators to bring suit in federal court to obtain "appropriate equitable relief" to "enforce ... the terms of the plan." 29 U.S.C. § 1132(a)(3). Westaff attempts to characterize its claim as one for equitable relief, labeling it a declaratory judgment action or action for specific performance. In determining whether an action for equitable relief is properly brought under ERISA, we look to the "substance of the remedy sought ... rather than the label placed on that remedy." *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n. 5 (9th Cir.1993) (citing *Mertens v.*

Hewitt Assocs., 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)). Westaff is seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim. "[A]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages--monetary relief for all losses their plan sustained as a result of the alleged breach" of the reimbursement provision. *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir.1997) (quoting *Mertens*, 508 U.S. at 255, 113 S.Ct. 2063). The Supreme Court has recently affirmed our approach in *Great-West Life*, in which the Court analyzed a similar action to enforce a reimbursement clause by looking past the parties' chosen labels to the substance of the relief sought:

> The basis for petitioners' claim is ... that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable--the imposition of a constructive trust or equitable lien on particular property--but legal--the imposition of personal liability for the benefits that they conferred upon respondents.

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708, 715, 151 L.Ed.2d 635 (2002).

This case differs from our prior cases only in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been placed in an escrow account and remains specifically identifiable. The action remains one for money damages. The district court correctly recognized this and dismissed the case for failure to state a claim.

Westaff also challenges the district court's grant of attorney's fees to Arce, contending both that the district court lacked jurisdiction to award fees and that it abused its discretion in awarding fees. We have held that a district court lacks jurisdiction to award fees under a fee-shifting statute if it has dismissed a case for lack of subject matter jurisdiction, unless the fee-shifting statute provides an independent

jurisdictional basis. *See, e.g.*, *Zambrano v. INS*, 282 F.3d 1145, 1150 (9th Cir.2002). However, when an ERISA plan administrator brings a suit seeking non-equitable relief, dismissal is properly on the merits for failure to state a claim, rather than for lack of subject matter jurisdiction. *Cement Masons Health & Welfare Trust Fund for N. Cal. v. Stone*, 197 F.3d 1003, 1007-08 (9th Cir.1999). The district court had jurisdiction to enter a fee award.

We review the district court's fee award for abuse of discretion. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir.1984). The district court evaluated Arce's attorney's fee motion using the factors we set out in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir.1980), and concluded that a fee award was justified. We agree. The escrow account was set up through an agreement with the beneficiary to make it easier for Westaff to obtain the funds in the event it is determined to be entitled to them. The beneficiary's cooperation should not now be used as a weapon by the insurance company to force the beneficiary into a lawsuit in federal court that Congress, in enacting ERISA, intended to bar. We therefore affirm the award of fees.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Westaff (USA) Inc.,	)	Filed October 23, 2002
	)	
Plaintiff,	)	
	)	CIV 99-1222-PHX-MS
	)	
v.	)	
	)	ORDER
Betty Arce,	)	
	)	
Defendant.	)	
	)	

On March 15, 2000, Plaintiff filed a Motion for Summary Judgment. [Doc. #36]. The next day, Defendant filed a Motion for Summary Judgment. [Doc. #38]. On April 13, 2000, Defendant filed a Response to Plaintiff's Motion for Summary Judgment. [Doc. #42]. Plaintiff filed a Response to Defendant's Motion for Summary Judgment on April 20, 2000. [Doc. #44]. On April 21, 2000, Plaintiff filed a Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment. [Doc. #46]. The Court heard oral argument on Plaintiff's and Defendant's Motions for Summary Judgment on May 15, 2000.

Based on the parties' oral and written arguments, the record in this case, and applicable law, the Court now rules as follows:

I. BACKGROUND

Defendant, Betty Arce, was an employee of Plaintiff, Westaff Staff Services. [Doc. #1 at p.2]. Plaintiff is Administrator of the Western Staff Services Employee Health Plan (the "Plan"), an Employee Welfare Benefit Plan within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1). [Id. at p.1]. Among other

things, the Plan provides medical benefits for employees of Plaintiff, and their dependents. [Id.].

On November 19, 1997, Defendant was injured in a car accident. [Id. at p.2]. Defendant was a "covered person" under the ERISA benefit plan established and maintained by Plaintiff. [Id.]. The Plan paid medical expenses on behalf of Defendant in excess of $30,000. [Id.]. The Plan provides, among other things:

> Accepting benefits under this Plan for those incurred medical or dental expenses automatically assigns to the Plan any rights the Covered Person may have to recover payments from any third party or insurer. This subrogation right allows the Plan to pursue any claim which the Covered Person has against any third party, or insurer, whether or not the Covered Person chooses to pursue that claim. The Plan may make a claim directly against the third party or insurer, but in any event, the Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full.
>
> . . .
>
> The Covered Person agrees to recognize the Plan's right to subrogation and reimbursement. These rights provide the Plan with a priority over any funds paid by a third party to a Covered Person relative to the Injury or Sickness, including a priority over any claim for non-medical or dental charges, attorney fees, or other costs and expenses.
>
> Notwithstanding its priority to funds, the Plan's subrogation and refund rights, as well as the rights assigned to it, are limited to the extent to which the Plan has made, or will make, payments for medical or dental charges as well as any costs and fees

> associated with the enforcement of it rights under the Plan.

[Id., Exh. 1].

On February 5, 1998, Defendant signed a Reimbursement Agreement in which Defendant agreed that in accordance with the "subrogation" provisions of the Employee Benefit Plan, Defendant would reimburse and pay promptly to Plaintiff an amount from any recovery from third persons which was necessary to repay the benefits paid. [Id. at p.2, Exh. 2]. The Agreement also provided that Defendant would pay all attorneys' fees and costs incurred by Plaintiff in pursuing any rights under the Agreement. [Id. at p.2, Exh. 2].

Defendant pursued a claim for personal injury against a third party, and that third party paid $15,000 in satisfaction of the claim. [Id. at p.3]. The $15,000 is being held in a trust account because Plaintiff and Defendant have not been able to reach an agreement regarding the $15,000 and Plaintiff's subrogation and reimbursement rights. [Id.].

In July 1999, Plaintiff brought this action against Defendant so that the rights and liabilities of the parties with respect to the obligations of reimbursement and subrogation under the Plan and Reimbursement Agreement could be adjudicated, and so an order requiring the specific performance of the Plan and Reimbursement Agreement could be issued. [Id. at pp.2-3].

II. SUBJECT MATTER JURISDICTION

The ERISA statutes, specifically 29 U.S.C. § 1132(a)(3), provide for specific remedies in an ERISA cause of action. Under 29 U.S.C. § 1132(a)(3), a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provisions of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce

> any provisions of this subchapter or the terms of the plan.

The United States Supreme Court has interpreted "equitable relief" under 29 U.S.C. § 1132(a)(3) to include only those types of relief that were typically available in equity, such as injunction, mandamus, and restitution. See Mertens v. Hewitt Assocs., 508 U.S. 248, 257-58 (1993). Defendant argues that this Court lacks subject matter jurisdiction to entertain Plaintiff's claims because Plaintiff is seeking a remedy that does not fall within the traditional equitable remedies recognized under 29 U.S.C. § 1132(a)(3). Relying on Mertens, Defendant contends that the term "other equitable relief" refers to relief such as injunction, mandamus, and restitution; it does not refer to the seeking of compensatory damages to redress monetary loss. [Doc. #38]. Defendant argues that although Plaintiff is requesting the Court to provide declaratory relief and an order for specific performance, this is "simply an action for monetary damages that resulted from a claim for contractual reimbursement," and as such, is not recognized by 29 U.S.C. § 1132(a)(3). [Id. at p.18].

In arguing that this Court lacks subject matter jurisdiction, Defendant relies on the Ninth Circuit case FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997). In FMC Medical, Plaintiff FMC was a provider of ERISA controlled health plans ["Plans"], and Defendant Owens, an employee of a subsidiary of FMC, was a participant in the Plans. Owens was injured in an automobile accident, and in order to receive the Plans' benefits, FMC required Owens to sign a "reimbursement form." The form provided in pertinent part:

> I agree for myself and dependent(s), to reimburse FMC Corporation for any amounts paid by the plan and recovered from another person or company. If I bring a claim against any party, benefits payable under this Plan must be included in the claim, and

> when the claim is settled I must reimburse the Plan for the benefits provided.

Id. at 1259.

FMC paid Owens' medical bills and disability benefits. In all, the Plans paid Owens over $50,000 as a result of his automobile accident. Owens settled his claim with the driver of the other car for $100,000. FMC then brought an action against Owens to "enforce the terms of the Plans and to obtain 'equitable reimbursement' from Owens' third party recovery for the benefits previously paid to or on his behalf by the Plans." Id. FMC contended that its claim for reimbursement was authorized by 29 U.S.C. § 1132(a)(3). Owens claimed that FMC was not seeking an equitable remedy under § 1132(a)(3), but that it was actually seeking money damages disguised as a claim for equitable relief. See id. at 1260.

The Ninth Circuit held that FMC's right under the Plans was not one of subrogation because the Plans said nothing about FMC's ability to assert the rights of Owens against a third party so that FMC could recover the amounts it paid to Owens. *See* id. Rather, the court held that FMC's claim was one of contractual reimbursement. The court also held that FMC was not seeking restitution, as referred to in Mertens,[1] because Owens did not obtain FMC's funds by any fraud or wrong-doing. Instead, the Ninth Circuit held that essentially, FMC was seeking a breach of contract claim for monetary relief, and that such monetary relief was not available under 29 U.S.C. § 1132(a)(3). See id. at 1261. Relying on Mertens' interpretation of equitable relief available under 29 U.S.C. § 1132(a)(3), the Ninth Circuit declined to extend the interpretation of 29 U.S.C. § 1132(a)(3) to include a claim for reimbursement. Hence, the Ninth Circuit held that FMC's claim was not cognizable under 29 U.S.C. § 1132(a)(3), and

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[1] In Mertens, the Supreme Court referred to restitution as the return of "ill-gotten" plan assets or profits. 508 U.S. at 260.

as such, the district court was without subject matter jurisdiction to consider the claim. See id. at 1262.

Plaintiff states that it is seeking declaratory relief and specific performance of the Plan provisions and of the Reimbursement Agreement. [Doc. #44 at p.10]. Plaintiff argues that only equitable relief is available under the applicable ERISA statute, and that because declaratory relief and specific performance are equitable remedies, they are available under ERISA in this type of action; thus, the Court has subject matter jurisdiction over Plaintiff's claims. [Id.].

Plaintiff distinguishes FMC Medical, and the more recent case, Cement Masons Health and Welfare Trust Fund for Northern California v. Stone, 197 F.3d 1003 (9th Cir. 1999),[2] from the present case on the grounds that there was no claim for specific performance in FMC Medical or Cement Masons as there is in the present case. [Id. at p.11]. Plaintiff also notes that in FMC Medical and Cement Masons, the plan beneficiary had directly received a recovery from the third party tortfeasor and the recovery was no longer in existence, thus, the plans in those cases sought a money judgment. Plaintiff claims that the present case is different from FMC Medical and Cement Masons because in this case, the recovery is in the hands of the Plan and is being held in trust until the rights and liabilities under the Plan are determined; thus, no money judgment is being sought against the Plan beneficiary. [Id.].

Although FMC did not specifically state that it was seeking specific performance of the plan, the Ninth Circuit noted that FMC brought action against Owens "*to enforce the terms of the Plan* and to obtain 'equitable reimbursement' from Owens's third party recovery for the benefits previously

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[2] The Ninth Circuit in Cement Masons held that the reimbursement of benefits paid by the health and welfare trust fund on behalf of the decedent, from funds that the decedent's children recovered from a third party tortfeasor, was not an available remedy in an action brought pursuant to ERISA, 29 U.S.C. § 1132(a)(3).

paid to or on his behalf by the Plans." FMC Medical, 122 F.3d at 1259 (emphasis added). Whether the recovery from the third party tortfeasor is in the hands of the plan beneficiary or being held in a trust, Plaintiff is still seeking equitable reimbursement from the funds Defendant recovered from the third party tortfeasor. According to FMC Medical and Cement Masons, this type of relief is not available under 29 U.S.C. § 1132(a)(3).

Although Defendant argues that this Court lacks subject matter jurisdiction over Plaintiff's claims because Plaintiff is seeking a remedy that is not available under 29 U.S.C. § 1132(a)(3), it is proper for this Court to dismiss Plaintiff's claims on the merits for failure to state a claim upon which relief can be granted, rather than on lack of subject matter jurisdiction. See Cement Masons, 197 F.3d at 1008 ("[A] dismissal of an ERISA claim under § 1132(a)(3) is properly a dismissal on the merits rather than a dismissal for want of subject matter jurisdiction."

III. ATTORNEYS' FEES AND COSTS

In her Motion for Summary Judgment, Defendant claims she is entitled to attorney's fees and costs pursuant to 29 U.S.C. § 1132(g)(1), which permits an award of reasonable attorney's fees and costs in any action under that subchapter by a participant, beneficiary, or fiduciary. Recovery of attorney's fees and costs does not necessarily depend upon the outcome of the action. See Oster v. Barco of Calif. Employees' Retirement Plan, 869 F.2d 1215, 1221 (9th Cir. 1988).

Relying on In re Knight, 207 F.3d 1115 (9th Cir. 2000),[3] Plaintiff argues that if the Court finds that there is no subject matter jurisdiction over the Complaint, any dismissal should

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[3] The Ninth Circuit in In re Knight held that if a court lacks subject matter jurisdiction to hear a claim under ERISA, that court also lacks subject matter jurisdiction to award costs and attorney's fees pursuant to ERISA's cost and fee-shifting provision. 207 F.3d at 1119.

not include a judgment for attorney's fees or costs in favor of Defendant because the Court lacks subject matter jurisdiction to award fees and costs under 29 U.S.C. § 1132(g)(1). [Doc. #44 at pp.11-12].

As previously stated, it is proper for this Court to dismiss Plaintiff's Complaint on the merits for failure to state a claim upon which relief can be granted, rather than on lack of subject matter jurisdiction. Because the Court is dismissing Plaintiff's claims on the merits rather than for want of subject matter jurisdiction, the Court does not lack subject matter jurisdiction in determining whether to award attorney's fees and costs under 29 U.S.C. § 1132(g)(1).

In deciding whether to exercise its discretion to award attorney's fees and costs, the Court considers: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. See Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

In its Response to Defendant's Motion for Summary Judgment, Plaintiff contends that attorney's fees and costs are not warranted; it does not mention whether the Plan has the ability to satisfy an award of fees and costs. [Doc. #44 at pp.11-13]. Defendant's action seeks to resolve an important legal question regarding the interpretation of equitable relief available under ERISA and how it affects subject matter jurisdiction in ERISA cases. Although Plaintiff presented a non-frivolous argument, Defendant's position has the greater merit. Accordingly, the Court will exercise its discretion and award attorney's fees and costs to Defendant upon Defendant's compliance with the Rules of Practice of the United States District Court for the District of Arizona, Local Rule 2.20.

IV. CONCLUSION

Plaintiff claims it is seeking declaratory relief and specific performance of the Plan and Reimbursement Agreement. However, Plaintiff is actually seeking equitable reimbursement from the funds Defendant recovered from the third party tortfeasor, which is not a cognizable claim under 29 U.S.C. § 1132(a)(3). Accordingly, Plaintiff has failed to state a claim upon which relief can be granted, and Plaintiff's Complaint must be dismissed. The Court will exercise its discretion and award Defendant attorney's fees and costs, provided Defendant complies with Local Rule 2.20.

IT IS THEREFORE ORDERED that Plaintiff's Complaint [Doc. #1] is DISMISSED WITH PREJUDICE because Plaintiff has failed to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment [Doc. #36] is DENIED as moot because Plaintiff's Complaint is being dismissed for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment [Doc. #38] is DENIED as moot because Plaintiff's Complaint is being dismissed for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that Defendant shall be awarded attorney's fees and costs upon Defendant's compliance with the Rules of Practice of the United States District Court for the District of Arizona, Local Rule 2.20.

DATED this 16th day of May, 2000.

/s/ Morton Sitver
MORTON SITVER
United States Magistrate Judge

THIRD PARTY RECOVERY PROVISION

RIGHT OF SUBROGATION AND REFUND

When this provision applies. The Covered Person may incur medical or dental charges due to injuries which may be caused by the act or omission of a third party. In such circumstances, the Covered Person may have a claim against that third party, or insurer, for payment of the medical or dental charges. Accepting benefits under this Plan for those incurred medical or dental expenses automatically assigns to the Plan any rights the Covered Person may have to recover payments from any third party or insurer. This subrogation right allows the Plan to pursue any claim which the Covered Person has against any third party, or insurer, whether or not the Covered Person chooses to pursue that claim. The Plan may make a claim directly against the third party or insurer, but in any even, the Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full.

The Covered Person:

(1) automatically assigns to the Plan his or her rights against any third party or insurer when this provision applies; and

(2) must repay to the Plan the benefits paid on his or her behalf out of the recovery made from the third party or insurer.

Amount subject to subrogation or refund. The Covered Person agrees to recognize the Plan's right to subrogation and reimbursement. These rights provide the Plan with a priority over any funds paid by a third party to a Covered Person relative to the Injury or Sickness, including a priority over any claim for non-medical or dental charges, attorney fees, or other costs and expenses.

Notwithstanding its priority to funds, the Plan's subrogation and refund rights, as well as the rights assigned to it, are limited to the extent to which the Plan has made, or will make, payments for medical or dental charges as well as any costs and fees associated with the enforcement of its rights under the Plan.

When a right of recovery exists, the Covered Person will execute and deliver all required instruments and papers as well as doing whatever else is needed to secure the Plan's right of subrogation as a condition to having the Plan make payments. In addition, the Covered Person will do nothing to prejudice the right of the Plan to subrogate.

Defined terms: "Recovery" means monies paid to the Covered Person by way of judgment, settlement, or otherwise to compensate for all losses caused by the Injuries or Sickness whether or not said losses reflect medical or dental charges covered by the Plan.

"Subrogation" means the Plan's right to pursue the Covered Person's claims for medical or dental charges against the other person.

"Refund" means repayment to the Plan for medical or dental benefits that it has paid toward care and treatment of the Injury or Sickness.

Recovery from another plan under which the Covered Person is covered. This right of refund also applies when a Covered Person recovers under an uninsured or underinsured motorist plan, homeowner's plan, renter's plan or any liability plan.

Assignment of Rights. As a condition to the Plan making payments for any medical or dental charges, the Covered Person must assign to the Plan his or her rights to any recovery arising out of or related to any act or omission that caused or contributed to the Injury or Sickness for which such benefits are to be paid. The scope of this assignment is consistent with the amount subject to subrogation or refund set forth above.

REIMBURSEMENT AGREEMENT

In accordance with the "subrogation" provision of the Employee Benefit Plan provided by WESTERN STAFF SERV., the undersigned on his own behalf, and, on behalf of any Dependents covered under said Plan hereby agrees to reimburse and pay promptly to WESTERN STAFF SERV. an amount not exceeding the aggregate amount of benefits paid or to be paid to me, or on my behalf, and agree that said payment shall not be based upon any apportionment based upon the amount of recovery, but shall be payment in full, as a result of injury or disease sustained on or about 11/19/97, in S. Bernardino County, State of CA, out of any recovery by settlement, judgment or otherwise from any source, including but not limited to any auto-medical policy, any underinsured or uninsured motorist policy, any no-fault policy, worker compensation recovery or any other insurance liability coverage (including any excess or umbrella insurance) other than as set forth in this agreement.

The Employee shall during the pendency of the claim:

1. immediately notify the Plan of any and all parties which the Employee or his Dependent may have a claim against as a result of injury, including, but not limited to, any insurance company providing coverage to the Employee or Dependent;

2. immediately notify the Plan of any claim for damages made on behalf of the Employee or Dependent in connection with the injury;

3. fully cooperate with the Plan in obtaining information about the injury;

4. acknowledge and approval of the Plan placing a lien against any third party including recovery from any source of insurance including that insurance paid for by the Employee to the extent of the cost of services provided by the Plan;

5. approval of the right of the Plan to pursue on its own or in the name of the Employee or Dependent, a claim against any third party (including the Employee's own insurance company) stemming from the injury. A definition of what constitutes a third party shall include any party or source from which the Employee could seek to recover.

The undersigned further agrees to said reimbursement not more than fifteen (15) days following receipt of the proceeds of a favorable judgment, settlement or recovery. If the undersigned fails to reimburse the Plan within said time, the undersigned shall pay interest to the Plan in the amount of 1 ½% per month until payment in full to the Plan.

The undersigned further agrees that they shall be liable for all attorneys' fees and costs incurred by the Plan in pursuing against the Employee or Dependent, and agrees further to not deduct any sums of money due and owing the Plan to any attorney for creation of the "fund".

The undersigned further agrees that in the case of recovery by a minor Dependent, the guardian of said minor shall be personally liable to the Plan for said reimbursement.

The undersigned further agrees to execute instruments and papers, furnish information and assistance, and take other necessary and related action as the Plan Administrator may require to facilitate it's right of reimbursement under the Employee Benefit Plan.

The undersigned represents and warrants that no release or discharge has been given with respect to his/her (their) rights of recovery described herein and that the undersigned has done nothing to prejudice said rights.

Betty Arce

Employee

_____

Dependent

_____

Legal Guardian of Minor
Dependent

2/5/98
Date

_____

Witnessed

June 10, 2002

Cathy A. Catterson
Clerk of the Court
United States Court of Appeals
Ninth Circuit
95 7th Street

San Francisco, CA 94103-1526

Re: Westaff (USA), Inc. v. Betty Arce
Court of Appeals Case No. 00-16178 and 01-15751
(consolidated)

Dear Ms. Catterson:

This law firm represents Westaff (USA), Inc. as Administrator of the Western Staff Services Employee Health Plan, the Appellant in the above referenced consolidated appeals. Oral argument on these appeals is scheduled for July 9, 2002 at 9:00 a. m. Pursuant to Rule 28(j), Federal Rules of Appellate Procedure, Appellant provides the citation of supplemental authorities.

In support of the argument appearing at page 13 of the Opening Brief in Case No. 00-16178, Appellant provides the following supplemental authority, which was issued after the submission of the Opening Brief:

Great West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002).

In support of the arguments appearing at page 21 of the Opening Brief in Case No. 00-16178, at page 10 of the Reply Brief in Case No. 00-16178, and at page 7 of the Opening Brief in Case No. 01-15751, Appellant provides the following supplemental authority, which was decided after the date of the respective briefs:

Zambrano v Immigration & Naturalization Service, 282 F.3d 1145 (9th Cir. 2002).

A copy of this letter is being sent to the attorney for the Appellee.

Sincerely,

Mark S. Sifferman

MSS/jld

cc: Andrew C. Hubert

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESTAFF (USA) INC., a California corporation (as Administrator of the WESTERN STAFF SERVICES EMPLOYEE HEALTH PLAN) dba Western Staff Services,	(	Nos. 00-16178 01-15751
Plaintiff - Appellant,	(	D.C. No. CV-99-01222-MS
v.	(	ORDER Oct 23 2002
BETTY ARCE, a single woman,	(	
Defendant - Appellee.	(	

Before: SCHROEDER, Chief Judge, FISHER and PAEZ, Circuit Judges

The motion for recall and stay of mandate pending filing of Petition for Certiorari is GRANTED.

A-22

Court of Appeals No. 00-16178

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESTAFF (USA), INC., a California corporation d/b/a Western Staff Services, as Administrator of the WESTERN STAFF SERVICES EMPLOYEE HEALTH PLAN,	(
Plaintiff - Appellant,	(
v.	(
BETTY ARCE, a single woman,	(
Defendant - Appellee.	(

Appeal from the United States District Court
for the District of Arizona (CIV 99 1222)

APPELLANT'S OPENING BRIEF

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ARGUMENT

APPELLANT SEEKS EQUITABLE RELIEF WITHIN THE MEANING OF 29 U.S.C. § 1132 (a)(3)

Appellant sought the following relief: (1) a declaration by the Court as to the rights of the parties under the Plan and Reimbursement Agreement as to the money held in escrow, and (2) an Order directing the parties to the lawsuit to execute appropriate documentation so that the escrowed money may be distributed according to the Court 's declaration. This type of relief is "appropriate equitable relief" under ERISA. Health Cost Controls of Illinois, Inc. v. Washington, 187 *F.*3d 703, 711 (7th Cir. 1999).

The Court gives no deference to the District Court's legal conclusion that the relief sought by Appellant is not equitable relief within 29 U.S.C. § 1132(a)(3). The determination of whether the Plaintiff's Complaint seeks such equitable relief is reviewed on appeal *de novo.* Aetna Life Ins. Co. v. Bayona, 223 F. 3d 1030, 1033 (9th Cir. 2000); Cement Masons Health and Welfare Trust Fund for Northern California v. Stone, 197 F. 3d 1003 (9th Cir. 1999).

As this Court well knows, an ERISA fiduciary may bring a civil action in District Court "to obtain other appropriate equitable relief . . . to enforce any provisions of . . . the terms of the Plan." 29 U.S.C. § 1132(a)(3).[1] This statute does not authorize a suit "for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." Mertens v. Hewitt Assoc., 508 U.S. 248, 113 *S.* Ct. 2063, 2066 (1993).[2] The term "equitable relief," however,

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[1] Appellee has never challenged Appellant's status as an ERISA fiduciary or that the action was one to enforce terms of the Plan.

[2] Putting a finer point on the petitioner's claim in Mertens, the Supreme Court said:

> Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages –

does include "forms of relief that were typically available in equity . . . . " Aetna Life Ins. Co. v. Bayona, *supra*, 223 F.3d at 1033, *quoting* Mertens v. Hewitt Assoc.

This Court dealt most recently with § 1132(a)(3) in Aetna Life Ins. Co. v. Bayona, *supra*. That case involved the remedy of interpleader. After discussing Mertens v. Hewitt Assoc., *supra*, and FMC Medical Plan v. Owens, 122 F.3d 1258, 1262 (9th Cir. 1997), the Court noted that "interpleader developed in equity and is governed by equitable principles." Aetna Life Ins. Co., *supra*, 223 F. 3d at 1033-1034. Thus, the Court found "appropriate equitable relief" was sought and thus the District Court has jurisdiction.

The Ninth Circuit never has faced our factual situation. All the cases decided by the Ninth Circuit so far (except its most recent case, Aetna,) involved situations where the plan participant already received the payment from the third party tortfeasor (or his insured). While the ERISA plan may have sought an equitable remedy to compel the payment of money, the remedy always was an attempt to gain money from the pocket of the defendant. FMC Medical Plan v. Owens, *supra;* Reynolds Metals Co. v. Ellis, 202 F.3d 1246 (9th Cir. 2000) *cert. pending*; Cement Masons Health & Welfare Trust Fund for Northern California v. Sonte, 197 F.3d 103 (9th Cir. 1999) *cert. pending*.[3] Moreover, the remedies sought here, declaratory relief and specific performance, were not involved in these cases.[4]

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monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties.

Mertens v. Hewitt Assoc., *supra*, 113 S.Ct. at 1068.

[3] Petitions for certiorari are pending in Reynolds Metals and Cement Masons. A petition also is pending in Great West Life & Annuity Ins. Co. v. Knudson, 208 F.3d 221 (9th Cir. 2000).

[4] To be sure, the Complaint in Cement Masons mentioned declaratory relief. 197 F.3d at 1005. That remedy was rejected because the only remaining fund of money was in the hands of persons who were not parties and who were not beneficiaries of the ERISA plan and because the

While the Ninth Circuit has not yet faced this fact pattern, the Seventh Circuit has. That Circuit has noted that subject matter jurisdiction can be found in this type of case without offending Ninth Circuit precedent. Health Cost Controls of Illinois, Inc. v. Washington, *supra*.

Health Cost Controls involved a third party recovery (an automobile insurance policy providing uninsured motorist benefits) where the settlement check was made payable to the ERISA Plan and the participant. The check was deposited in an interest bearing escrow account maintained by the participant's attorney. 187 F.3d at 706. The court noted that a judgment for money could not be justified under 29 U.S.C. § 1132(a)(3). The court then went on to discuss whether a constructive trust theory was possible. While the court believed that the constructive trust theory would be acceptable, it noted that the Ninth Circuit law was to the contrary. In discussing whether a federal cause of action did exist, the court listed other characterizations of the Plan's claims which are not contrary to Ninth Circuit precedent.

> Alternative characterizations of Health Cost 's claims (alternative to both restitution and constructive trust)-as seeking to impose an equitable lien on the escrow account or seeking a mandatory injunction directing Washington to sign over her claim to the money-are also permissible, moreover, and they reinforce our conclusion that Health Cost's claim is securely equitable and so within the jurisdiction conferred on the District Court by ERISA.

187 F.3d at 711.

The coercive and personal orders allowed in Health Cost Controls, and which are requested in this case, are traditional equitable remedies. Dobbs, Remedies (2nd Edition), §2.1(1),

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defendant had not recovered and was not going to recover from a third party. 197 F.3d at 1007.

pages 55 - 56; § 2.1(2), pages 59 - 60, §2.2, pages 72 - 74; Dobbs, Remedies, (1st Edition) § 2.1, page 25.

> Roughly speaking, the Chancellor's remedies were either coercive, restitutionary, declaratory, or in some cases, all of these. The coercive remedies turned on the Chancellor's unique power to enter an authoritarian personal order against the defendant commanding conduct of some specified sort, and subjecting the defendant to a punishment if he did not obey.

Dobbs, The Law of Remedies (1st Edition) §2.1, page 25; accord Dobbs, The Law of Remedies (2nd Edition) §2.1 (emphasis added).[5]

Paraphrasing this Court in Aetna Life, the remedies sought here, declaratory relief and specific performance, developed in equity and are governed by equitable principles. Aetna Life Ins. Co. v. Bayona, supra, 223 F.3d at 1033 - 1034. This case is not like Owens and its progeny; it is not an action to obtain money from the pocket of a defendant.

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[5] "The term equitable, when applied to a remedy, usually has a precise meaning. It means a remedy based on a personal order, commanding specified conduct of the defendant, such as an injunction, an order for specific performance, or a constructive trust or similar remedy coupled with an *in personam* order." Dobbs, Remedies (2nd Edition) §2.1(3), page 65.